*Green Tree Financial Corp.-Alabama v. Randolph**

I. INTRODUCTION

December 2000 has already been marked as the most significant month in the 2000 Term of the United States Supreme Court. Someday, historians may even designate this month as one of the most important months in the history of the Court, for on December 11, the Court issued its opinion in *Green Tree Financial Corp.-Alabama v. Randolph*.[1] Admittedly, the historians might be thinking of the Court's decision in *Bush v. Gore*,[2] which was delivered the very next day. Even though *Green Tree* is less historically significant—and less controversial—it is nonetheless an important development in evaluating the validity of arbitration agreements.

Green Tree has two significant holdings. First, the term "final decision," as it is used in the Federal Arbitration Act (FAA),[3] carries its well-established meaning of a decision that ends the litigation on the merits and leaves nothing else for the court to do but execute the order.[4] Related to this issue, the Court clarified the application of this definition, holding that there is no distinction between independent and embedded actions.[5] Second, an arbitration agreement that is silent regarding the costs and fees of arbitration is enforceable when the record does not support the litigant's perceived risk that prohibitive costs will prevent the vindication of statutory rights.[6]

II. FACTS, PROCEDURAL HISTORY, AND SUMMARY OF DECISIONS

In January 1994, Larketta Randolph purchased a mobile home from the Better Cents Home Builders, Inc. of Opelika, Alabama.[7] To finance her purchase, Randolph turned to Green Tree Financial Corp.-Alabama (Green Tree), a wholly owned subsidiary of the Green Tree Financial

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* 121 S. Ct. 513 (2000).

[1] Green Tree Fin. Corp.-Alabama v. Randolph, 121 S. Ct. 513 (2000).

[2] Bush v. Gore, 121 S. Ct. 525 (2000). Indeed, the *Green Tree* decision was issued right in the middle of the *Bush v. Gore* dispute.

[3] Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2000).

[4] *Green Tree*, 121 S. Ct. at 519–21.

[5] *Id.* at 521.

[6] *Id.* at 521–23.

[7] *Id.* at 517; Petitioners' Brief at 517.

Corporation.[8] To obtain the financing, Randolph signed a "Manufactured Home Retail Installment Contract and Security Agreement."[9] For the purposes of this dispute, there were only two relevant terms. First, Randolph was required to purchase "Vendor's Single Interest Insurance" in order to protect the vendor, presumably Better Cents Home Builders, or the lienholder in the event of Randolph's default.[10] The insurance specifically covered the costs of repossession.[11] The second relevant term was the agreement to submit all disputes related to the contract to binding arbitration.[12]

Contrary to what one might expect, this dispute did not begin with a collection action against Randolph, with the enforceability of the arbitration clause being her only recourse from the arbitrator's decision. Rather, Randolph sued Green Tree, alleging that the company violated the Truth in Lending Act (TILA),[13] by failing to disclose the Vendor's Single Interest insurance policy as a finance charge, as was required by the Truth in Lending Act (TILA).[14] One may speculate that, upon her discovery of

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[8] *Id.* at 517.

[9] *Id.* at 517–18.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 518 n.1. The arbitration agreement stated, in part,

> All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s). This arbitration Contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through court, but that they prefer to resolve their disputes through arbitration except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY ASSIGNEE (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws, including, but not limited to, all contract, tort, and property disputes will be subject to binding arbitration in accord with this Contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the Contract.

Id. (citation omitted).

[13] Truth in Lending Act, 15 U.S.C. §§ 1601–1667e (1994 & Supp. V 1999).

[14] *Id.* at 518.

the arbitration clause, Randolph amended her complaint, alleging violation of the Equal Credit Opportunity Act[15] due to the contract's requirement that she arbitrate her statutory claims.[16] In addition, Randolph brought these claims as a class action.[17]

Not surprisingly, Green Tree opted not to answer Randolph's claims, filing instead "a motion to compel arbitration, to stay the action, or, in the alternative, to dismiss."[18] In bringing multiple claims at one time, Green Tree created an "embedded" proceeding.[19] The District Court, ruling on four motions, (1) refused to certify Randolph's class action, (2) granted Green Tree's motion to compel arbitration, (3) denied Green Tree's motion to stay, and (4) dismissed Randolph's claims with prejudice.[20] After a failed attempt at a motion for reconsideration, Randolph appealed to the Eleventh Circuit.[21] Thus, all of the District Court's holdings were in favor of Green Tree and arbitration.

The Eleventh Circuit then decided two issues: whether the District Court's ruling was an appealable final decision, and whether the arbitration agreement provided enough minimum guarantees so that Randolph could properly pursue her TILA cause of action.[22] On the first question, the Eleventh Circuit decided that a final decision under the FAA[23] is an order that disposes of all issues and leaves nothing to be done other than execution of the order.[24] Therefore, Randolph's appeal was proper.

The Eleventh Circuit's second holding was decidedly more controversial. Noting that the arbitration agreement was silent as to the payment of costs of arbitration, the court found that the agreement "posed a risk" that Randolph would be unable to "vindicate her statutory rights" because of the high costs of arbitration.[25] Thus, the arbitration agreement was held to be unenforceable.[26] This victory for the plaintiffs was,

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[15] Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (1994).

[16] *Green Tree*, 121 S. Ct. at 518.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 520.

[20] *Id.* at 518 (citing Randolph v. Green Tree Fin. Corp., 991 F. Supp. 1410 (M.D. Ala. 1997)).

[21] *Id.*

[22] *Id.*

[23] Federal Arbitration Act, 9 U.S.C. § 16 (2000).

[24] *Green Tree*, 121 S. Ct. at 518.

[25] *Id.*

[26] *Id.*

however, short-lived. After granting certiorari, the United States Supreme Court agreed that the District Court's order was a final, appealable decision.[27] But the Court strengthened its decision in *Gilmer v. Interstate/Johnson Lane Corporation*,[28] holding that an arbitration agreement is not unenforceable merely because it is silent with respect to payment of the costs of arbitration.[29]

III. DISCUSSION

A. *The District Court's Order is a Final, Appealable Decision Under the FAA*

The first question addressed by the court was whether the District Court's order was immediately appealable.[30] Following the same logic as the Eleventh Circuit, the Court began by examining Section 16 of the FAA.[31] In relevant part, section 16 states,

> (a) An appeal may be taken from—. . . . (3) a final decision with respect to an arbitration that is subject to this title. (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—(1) granting a stay of any action under section 3 of this title; (2) directing arbitration to proceed under section 4 of this title; (3) compelling arbitration under section 206 of this title; or (4) refusing to enjoin an arbitration that is subject to this title.[32]

The District Court's order did, in fact, compel arbitration and dismiss all other claims.[33] Whether such an order was a "final decision with respect to an arbitration," per section 16(a)(3), was not as easy of a question. Green Tree presented the Court with a rather elaborate argument that explained why the District Court's order is not immediately appealable. First, Green Tree contended that the drafters of section 16 meant only to provide immediate appeal of an interlocutory order when

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[27] *Id.* at 518–19.

[28] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[29] *Green Tree*, 121 S. Ct. at 522.

[30] *Id.* at 519.

[31] *See id.* See 9 U.S.C. § 16 (1996) for the Federal Arbitration Act.

[32] Federal Arbitration Act, 9 U.S.C. § 16 (2000).

[33] Randolph v. Green Tree Fin. Corp., 991 F. Supp. 1410, 1425 (M.D. Ala. 1997).

that order is "hostile to arbitration."[34] Since the District Court's order favored arbitration, Green Tree argued that section 16 did not permit an appeal.[35] Rejecting this argument, the Court stated that section 16(a)(3) permits an immediate appeal of any such final decision, "regardless of whether the decision is favorable or hostile to arbitration."[36] Then, pointing to *Digital Equipment Corp. v. Desktop Direct, Inc.*[37] and *Coopers & Lybrand v. Livesay*,[38] the Court held that the longstanding meaning of the term "final decision" that has developed over time is "a decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment."[39] The Court then held that, because the FAA neither defines "final decision" nor indicates otherwise, this meaning applies today.[40]

Because the District Court's order compelled arbitration and dismissed all of Randolph's other claims with prejudice,[41] the court was left with nothing more to do but execute the judgment.[42] This, of course, meets the definition of a final decision. If the District Court had instead entered a stay, then Randolph would not have been allowed to appeal.[43] The Supreme Court noted that "[t]he question whether the District Court should have taken that course [and entered a stay] is not before us, and we do not address it."[44] Nonetheless, Green Tree contended in oral arguments that because the District Court should have entered a stay, the Supreme Court should simply treat the District Court's actual order as a stay, which would thus be unappealable.[45] Having already rejected this argument orally, the Court affirmed the Eleventh Circuit's decision that the District Court's order in this case was a final decision under the FAA, and thus immediately appealable.[46]

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[34] *Green Tree*, 121 S. Ct. at 519.

[35] *Id.*

[36] *Id.*

[37] Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994).

[38] Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

[39] *Green Tree*, 121 S. Ct. at 519 (citations omitted).

[40] *Id.* at 519.

[41] Randolph v. Green Tree Fin. Corp., 991 F. Supp. 1410, 1425 (M.D. Ala. 1997).

[42] *Green Tree*, 121 S. Ct. at 519–20.

[43] *Id.* at 520 n.2.

[44] *Id.*

[45] Oral Argument of Petitioner at 3–15, Gree Tree Fin. Corp.-Alabama v. Randolph, 121 S. Ct. 513 (2000) (No. 99-1235), *available at* 2000 WL 1513141.

[46] *Green Tree*, 121 S. Ct. at 521.

B. *Silence on Costs of Arbitration, by Itself, Does Not Render an Arbitration Agreement Unenforceable*

The Court also held that Randolph could not simply point to the arbitration agreement's silence regarding the payment of the costs of arbitration and claim that the agreement is therefore unenforceable. The potential risk that the costs of arbitration may be prohibitive is not enough to show that the agreement's silence on the costs will prevent Randolph from vindicating her statutory rights. [47]

In reaching this conclusion, the Court first paid tribute to *Gilmer*, which stated that the FAA's purpose was "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts."[48] The Court's analysis began by noting that Randolph (1) had not disputed that she agreed to arbitrate, and (2) did not attempt to show that Congress intended to preclude a waiver of judicial remedies.[49] Of course, the Court was alluding to the intriguing fact that, although Randolph did not want to arbitrate her claims, she did not attempt to avoid arbitration per *Gilmer*.[50] Instead, Randolph submitted that, because the arbitration agreement is silent regarding costs and fees, she bore a "risk" of having to pay prohibitive costs.[51] Thus, Randolph argued that this risk prevented her from vindicating her statutory rights in arbitration.[52]

The Court then found that, in the absence of any evidence on the record showing that Randolph's perceived risk would ever come to fruition, the risk of her having to pay a prohibitive sum of money is "too speculative to justify the invalidation of [the] arbitration agreement."[53] The "liberal federal policy favoring arbitration agreements" would be

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[47] *Id.*

[48] *Id.* at 522 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991)).

[49] *Id.*

[50] *Id.* (quoting *Gilmer*, 500 U.S. at 24).

[51] *Id.*

[52] *Id.* Note, however, that the Court in *Gilmer* established the standard that a federal statutory claim may be subject to arbitration when the parties have bargained for an arbitration agreement and Congress has not indicated "an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer*, 500 U.S. at 26.

[53] *Green Tree*, 121 S. Ct. at 522. The Court further indicated that Green Tree's counsel stated in oral arguments that the petitioners often voluntarily pay all arbitration costs. *Id.* at 522 n. 6.

frustrated if the Court enforces the agreement when the record is as devoid of support as it is in this case.[54]

Indeed, Randolph had the burden of showing that the agreement was invalid, either under *Gilmer* or due to its prohibitive costs.[55] In this respect, Randolph completely failed.[56] Thus, the agreement's silence with respect to costs does not negate its validity.[57]

IV. THE ELEVENTH CIRCUIT ON REMAND

Justice Ginsburg, with whom Justices Stevens, Souter, and Breyer joined, concluded her separate concurring opinion with the following advice to the Eleventh Circuit:

> The class-action issue was properly raised in the District Court and the Court of Appeals. I do not read the Court's opinion to preclude resolution of that question now by the Eleventh Circuit. Nothing Randolph has so far done in seeking protection against prohibitive costs forfeits her right to a judicial determination whether her claim may proceed either in court or arbitration as a class action.[58]

In accordance with this advice, the Eleventh Circuit's decision on remand primarily discussed "whether an arbitration agreement that bars pursuit of classwide relief for TILA violations is unenforceable . . . ."[59] *Gilmer*, of course, provides the appropriate guidance for determining whether a federal statutory claim is arbitrable.[60] Because the Congressional intent in effecting the FAA must always be considered alongside Congress's intent for enforcing any other statute, *Gilmer* holds, statutory claims are always arbitrable unless Congress "evince[s] an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[61] Randolph, as the party seeking to avoid arbitration, had the burden of showing this intent.[62] In addition, *Gilmer* stated that an inherent

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[54] *Id.* (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). The Court noted that Randolph had yet to offer any evidence supporting her contention that the arbitration costs are prohibitively high. *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* at 525 n.4 (Ginsburg, J., concurring in part and dissenting in part).

[59] Randolph v. Green Tree Fin. Corp., 244 F.3d 814, 816 (11th Cir. 2001).

[60] *Id.* (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)).

[61] *Id.* at 817 (quoting *Gilmer*, 500 U.S. at 26).

[62] *Id.* (citing *Gilmer*, 500 U.S. at 26).

conflict between the policies underlying the statute at issue and the enforcement of the statute is not enough to meet this burden.[63]

In concluding that Randolph failed to show that the absence of class relief in the arbitral forum makes the agreement unenforceable under *Gilmer*, the Court pointed to its recent analysis in *Bowen v. First Family Financial Services, Inc.*[64] The Court in *Bowen* examined and analyzed this issue under *Gilmer* and found that neither the text and its legislative history, nor the inherent conflict between TILA and the FAA renders an arbitration agreement unenforceable.[65] *Bowen* concluded that TILA allowed class actions but did *not* provide an absolute, non-waivable right to class relief.[66] However, this analysis was dicta in *Bowen* because the plaintiff did not have standing to have such a claim adjudicated.[67]

Succinctly put, in its opinion on remand the Eleventh Circuit applied its analysis from *Bowen* and held that Randolph failed to meet the burden established in *Gilmer*, as described above.[68] Thus, an enforceable arbitration agreement may preclude a party from seeking class relief under TILA.[69] As the lower court then pointed out, this decision reflects the opinion of the Third Circuit in *Johnson v. West Suburban Bank*,[70] which held that TILA claims are arbitrable *even if* the arbitration agreement expressly prohibits class relief.[71] The Eleventh Circuit was confident that the Supreme Court would approve of its opinion on remand because it was consistent with *Gilmer* (and *Green Tree*) in that the lower court gave full weight to the policy of the FAA.[72]

The Eleventh Circuit also briefly entertained Randolph's claim that the arbitration agreement's silence on the issue of class actions should not prevent her from seeking classwide relief in arbitration.[73] Randolph argued that allowing such relief would properly reconcile any discord between the FAA's goals and TILA's enforcement scheme.[74] After

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[63] *Id.* (citing *Gilmer*, 500 U.S. at 27–28).

[64] *Id.* at 817–18 (citing Bowen v. First Family Fin. Servs. Inc., 233 F.3d 1331 (11th Cir. 2000)).

[65] *Id.* (citing *Bowen*, 233 F.3d at 1334, 1338).

[66] *Id.* at 817 (citing *Bowen*, 233 F.3d at 1337-38).

[67] *Id.* at 818 n.1.

[68] *Id.* at 817–18.

[69] *Id.* at 819.

[70] Johnson v. W. Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000).

[71] Randolph v. Green Tree Fin. Corp., 244 F.3d 814, 818 (11th Cir. 2001).

[72] *Id.* at 818–19.

[73] *Id.* at 815–16.

[74] *Id.* at 815.

signifying that its decision in *Protective Life Insurance Corp. v. Lincoln National Life Insurance Corp.*[75] may require it to join the reasoning of the Seventh Circuit and the District Court of Minnesota, which held in *Champ v. Siegel Trading Co.*[76] and *Gammaro v. Thorp Consumer Discount Co.*,[77] respectively, that courts cannot mandate class-wide arbitration when the arbitration agreement is silent on this matter, the court declined to decide the issue because the argument was not properly preserved by the appellant.[78] The District Court originally held that *Protective Life* barred the pursuit of classwide relief in arbitration.[79] Thus, the Eleventh Circuit speculated, Randolph strategically rested on the District Court's holding in formulating her subsequent arguments.[80] As Judge Carnes put it, "[h]aving saddled up that horse, Randolph must continue riding it."[81]

V. CONCLUSION

Although Larketta Randolph almost certainly did not anticipate being required to appear before the United States Supreme Court when she questioned the propriety of a relatively insignificant fee, many in the dispute resolution community are thankful for the clarity provided by the resulting decision, albeit on two narrow issues.[82] However, *Green Tree* may also prove useful due to its foreshadowing of arbitration-related issues that the Court may resolve in the near future, such as whether a "loser pays" arbitration system is too cost prohibitive, or whether a Motion to Compel may be changed to a Motion to Stay. While arbitration has existed in the United States for much of our litigious history, this case shows how much potential there is for improvement in the law governing the enforcement of arbitration agreements. Given the Court's strong

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[75] Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281 (11th Cir. 1989) (per curiam).

[76] Champ v. Siegel Trading Co., 55 F. 3d 269 (7th Cir. 1995).

[77] Gammaro v. Thorp Consumer Disc. Co., 828 F. Supp. 673 (D. Minn. 1993).

[78] *Randolph*, 244 F.3d at 815–16.

[79] Randolph v. Green Tree Fin. Corp., 991 F. Supp. 1410, 1424 (M.D. Ala. 1997).

[80] *Randolph*, 244 F.3d at 816.

[81] *Id.*

[82] Marshall E. Tracht, *Arbitration of Truth-In-Lending Act Claims*, 118 BANKING L.J. 3, 4 (2001).

affirmation of the landmark *Gilmer* case, one can only expect that the Court will continue to proactively support arbitration as an effective method of resolving disputes of all degrees of complexity for the foreseeable future.

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